HONG LEONG CO. SDN. BHD.

v.

Y.T.C. REALTY SDN. BHD. & ORS.

HIGH COURT MALAYA, KUALA LUMPUR
VC GEORGE J
[CIVIL SUIT NO. C 1403 OF 1984]
10 MARCH 1986

CIVIL PROCEDURE: *Guarantee - Variance made without surety's consent - Whether discharges the surety as to transactions subsequent to the variance - Whether any triable issues.*

This was an appeal by the 2nd and 3rd defendants from the decision of the Senior Assistant Registrar in an O. 14 application in the plaintiffs' favour. The plaintiffs' claim was for goods sold and delivered to the 1st defendant in which the 2nd and 3rd defendants were the guarantors under the letter of guarantee dated 12 January 1983. The plaintiffs claimed interest on the outstanding sum at the rate of 18% per annum.

There was no documentary proof as to when the plaintiffs commenced charging interest and at what rate of interest. But there was ample evidence that the plaintiffs actually charged interest at the rate of 18% per annum some two months after the date of the execution of the letter of guarantee.

Held:

[1] Under s. 86 of the Contracts Act 1950, any variance made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

[2] The triable issue of the fact is therefore whether the plaintiffs charged the 1st defendant interest and if so, when they commenced charging interesting and whether the imposition of interest would amount to a variation of contract between the 1st defendant and the plaintiffs. This issue of fact is material in deciding whether the 2nd and 3rd defendants would continue to be liable under the letter of guarantee or discharged under s. 86 of the Contracts Act.

[3] As the material facts are not clear the appeal was allowed and the decision of the Senior Assistant Registrar was set aside and the 2nd and 3rd defendants were given leave to defend the action.

[Appeal allowed and relevant consequential orders made.]

Legislation referred to:
Contracts Act 1950, s. 86
Rules of the High Court 1980, O. 14

For the 2nd & 3rd defendants/appellants - C.H. Liew; M/s. Zaitoon, C.H. Liew & Mohd. Ali
For the plaintiffs/respondents - Patrick Y.C. Chen; M/s. Allen & Gledhill

JUDGMENT

VC George J:

The Senior Assistant Registrar had on an O. 14 application given judgment in favour of the plaintiffs against the 2nd and 3rd defendants for the amount claimed with interest thereon at 18% per annum from 1 December 1983 until realisation and costs. The defendants appealed

against the Senior Assistant registrar's decision. The appeal was dismissed with costs when it was heard in chambers but upon application therefor the matter was adjourned to open Court for further argument, after hearing which I changed my mind and allowed the appeal. The summary judgment given by the Senior Assistant Registrar was set aside and the 2nd and 3rd defendants were given leave to defend the action. The defendants were ordered to pay costs of the appeal.

The claim against the 2nd and 3rd defendants was in respect of the sum of RM55,199.10 said to be the balance due and owing as at 30 November 1983 in respect of goods sold and delivered to the first defendant and in respect of which the 2nd and 3rd defendants together with the 4th defendant were said to have stood guarantee. By para. 4 of the statement of claim the plaintiffs contend that they were entitled to levy interest at the rate of 18% per annum on amounts outstanding in respect of goods sold and delivered to the 1st defendant. It would seem that the RM55,199.10 claimed could include amounts charged by way of such interest.

The 2nd defendant contends that he was not obliged to meet the terms of his guarantee on the grounds that the original contract between the 1st defendant and plaintiffs had been varied sometime after he had become a guarantor, which variation resulted in the imposition of the said interest on outstanding amounts, such variation having been made without his knowledge or consent.

The letter of guarantee exhibited to the affidavit of Eric Tan in support of the O. 14 application guarantees and payment and discharge of all "trading liabilities" incurred by the 1st defendant up to a limit of RM150,000 and is dated 12 January 1983. What comes under the compass of trading liabilities, and in particular whether it included interest, is not explained in the document.

Now, in support of the imposition of interest of 18% per annum the plaintiffs rely on the Exhibit ET3 also attached to Eric Tan's affidavit. This document appears to be an application for credit facilities made by the 1st defendant to the plaintiffs. In making the application the 1st defendant is seen to have agreed to allow the plaintiffs to impose interest on outstanding amounts at the rate of 18% per annum. The date of the application and the date it was received by the plaintiffs are not shown on the document but on p. 4 of the document somebody in the credit section of the plaintiff company has made certain remarks and recommendations which appear to have been made on 3 March 1983. One of the remarks made is that RM115,163.86 worth of goods had already been supplied (presumably as on 3 March 1983) to the 1st defendant.

This document certainly suggests that with agreement of the 1st defendant the 18% interest charge was imposed but only on or after 3 March 1983, some 2 months after the 2nd and 3rd defendants had entered into the letter of guarantee. The plaintiffs do not any where state when they began charging interest and how much, if any, of the RM55,199.10 claimed in the statement of claim represents interest.

Section 86 of the Contracts Act is as follows:

> Any variance, made without the surety's consent, in the terms of the contract between the principal debtor and the creditor, discharges the surety as to transactions subsequent to the variance.

In my view whether the plaintiff company charged the defendants interest and if they did when they began to do so and whether their doing so would amount to a variation of the contract between the 1st defendant and plaintiffs and in the circumstances, whether the guarantors continue to be liable under the letter of guarantee of 12 January 1983 are triable issues that could not be disposed of summarily. The relevant facts are not clear and accordingly the law cannot be applied to them.

As to the 3rd defendant, it seemed that it was he who had executed ET3 on behalf of the 1st defendant which purports to allow the plaintiffs to impose the 18% interest charge. But what is agreed to by the 3rd defendant in the Exhibit ET3 *per se* does not allow the plaintiffs the right to impose interest on debts occurred prior to the acceptance of the application for credit which, as has been seen, was only processed on 3 March 1983. In the circumstances, as against the 3rd defendant too, if for noting else from a lack of clarity of the relevant facts, I was of the view that the plaintiffs were not entitled to summary judgment.

The appeal was allowed and the relevant consequential orders made.

Also found at [1987] 1 CLJ 478